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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 721

FRANCIS DeROSA,
Counter-Plaintiff, Petitioner,

vs.

AETNA INSURANCE COMPANY,
Counter-Defendant, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

1. Is the insured released from the condition in his contract obligating him to assist and cooperate with his insurance company in the trial of a personal injury claim against him by reason of the fact that the insurance company, before the trial, had sought adjudication of the question of whether the insurance company was given timely notice of the injury?

2. May an insured accept the services of lawyers furnished by the insurer and allow them to file their appearance and later refuse or fail to comply with a request that he attend the trial of the action because the request was made by these lawyers?

STATEMENT OF THE CASE.

Petitioner's statement of the case contains gratuitous self-serving statements. Fortunately the opinion of the Court of Appeals, Appendix to Petition, 1a-5a, contains a complete and plain statement of the facts and issues in this case. In addition, we offer this supplementary statement.

There are three parties concerned in this litigation:

1. Aetna Insurance Company, which has taken over the Century Indemnity Company, hereinafter called Aetna.

2. Dan Serafine, policy holder of Century Indemnity Company, hereinafter called Serafine.

3. Francis DeRosa, who claimed personal injury while riding a horse owned by Serafine, hereinafter called DeRosa.

By forwarding to Aetna's predecessor on *March 3, 1959* the summons served upon him in a state court case #58 S 20672, Serafine, for the first time, notified Aetna that DeRosa was asserting a claim against him for personal injuries alleged to have been received while riding a horse owned by Serafine on *March 20, 1957* (later this date was changed to November 20, 1957). Two days after receiving the summons the company notified Serafine it would not defend him because of the late notice.

Aetna's predecessor then filed a suit (not the present one but an earlier declaratory judgment suit) in the United States District Court (Case #59 C 834), against Serafine and DeRosa, contending that it should not have to defend the state court suit or pay DeRosa's claim because the notice was untimely. The declaratory judgment case was tried, and the District Court entered judgment against Aetna and ordered it, in substance, to defend the case and pay any judgment that might be rendered in the state

court. The judgment was affirmed by the Court of Appeals. *Century Indemnity Company* v. *Serafine*, 311 F. 2d 676 (CA 7 Ill. 1963).

Following this declaratory action Aetna undertook the defense of the personal injury case in the state court.

On May 27, 1963, William E. Rattner, a lawyer of the law firm defending Serafine in the state court suit under the policy with Aetna, notified Serafine that the case was going to trial and asked him to attend. Serafine stated that he could not come to the trial; that he was going to Lake Geneva, Wisconsin (A. 170). Serafine further told Rattner that if he wanted to discuss the matter, to talk to Martin Silverman, Serafine's personal attorney (A. 170). The phone call to Silverman, the evidence shows, did not obtain Serafine's cooperation or attendance (A. 169, 180, 181).

DeRosa's case against Serafine was assigned for trial on May 28, 1963. Evidence began on May 29th. The first witness for the plaintiff DeRosa was the said Martin Silverman, the defendant's personal attorney. Silverman testified to his recollection of alleged admissions made by Serafine in the declaratory judgment action in the District Court. Serafine did not attend the trial or communicate with the lawyers furnished by Aetna to defend him until he appeared in the court room on the morning of June 3, 1963, in the company of DeRosa's attorney (A. 180, 181, 215). Serafine then became the last witness for DeRosa.

DeRosa, in the personal injury case, recovered a judgment for $25,000.00 against Serafine.

Thereafter Aetna filed this suit (a second declaratory judgment suit) in the District Court against Serafine and DeRosa, seeking a judgment that it be absolved from all liability under its policy because of Serafine's failure to cooperate in the trial of the case in the state court. In

answer to DeRosa's interrogatories, Aetna detailed in 24 pages Serafine's lack of cooperation, including his failure to attend the personal injury trial, and the particulars of why it was prejudiced (A. 55-79).

DeRosa moved to dismiss the suit on the ground that the issue was *res judicata,* and on the further ground that the granting of a declaratory judgment was in the discretion of the court, and that all issues between the parties could be tried in a garnishment action against Aetna by DeRosa (A. 24-28). Serafine filed a similar motion (A. 26). The court granted these motions (A. 48).

At the same time, DeRosa filed, by way of counterclaim, the instant case, which was for garnishment, for recovery under the Illinois Insurance Code (Ill. Rev. Stat., 1963, ch. 73, para. 1000), or for recovery under the terms of the policy (A. 40). At the trial in the District Court DeRosa offered the insurance policy and rested (A. 144, 145). Aetna proved that Serafine was requested to attend the trial, and that he failed to appear, or even communicate with the lawyers defending him, until a week after he was notified. DeRosa offered no rebuttal (A. 216).

It is to be noted that the position of DeRosa in the District Court was "Dan Serafine complied with all the terms and conditions of the policy of insurance issued to him by the Century Indemnity Company" (A. 41). There was no explanation offered in the District Court for Serafine's failure to attend the personal injury trial; no claim that Aetna had waived its right to insist on the cooperation of Serafine.

DeRosa repeatedly contended in the District Court that Aetna's claim of Serafine's lack of cooperation could not bar DeRosa's counterclaim because the issue was *res judicata* and had been adversely decided against Aetna in the first declaratory judgment suit (A. 37 with reference to A. 5, 6; A. 86-88, 89-121, 157, 193, 194), and that Aetna's

complaints of Serafine's failure to cooperate were an attempt to get the District Court to retry the state court personal injury suit (A. 148-150).

It was Aetna's position in the District Court that Serafine as well as Aetna continued to be bound by his policy after the first declaratory judgment, and that Serafine's lack of cooperation in the personal injury trial was available to Aetna as a defense to DeRosa's counterclaim.

In the Court of Appeals DeRosa conceded that Aetna's position on the matter of *res judicata* was correct.

The Court of Appeals decided:

1. That the policy issued to Serafine had as a condition: "the Insured shall cooperate with the Company and upon the Company's request, shall attend hearings and trials".

2. The failure of Serafine "without acceptable excuse" to attend the trial was a material breach of the condition in the policy, which prejudiced Aetna's attempts to defend him.

3. This breach precluded recovery by DeRosa under the terms of the policy, under the provisions of the Illinois Insurance Code, and under the case law of garnishment.

ARGUMENT.

The Court of Appeals considered all of the relevant facts presented in the lengthy appendix and additional appendix. The opinion filed by the Court discussed and resolved all of the material issues in the case.

Serafine's policy required him to assist and cooperate with his insurance company in defending claims against him, and expressly obligated him to attend hearings and trials upon the company's request. Case law uniformly interprets this condition as material to the entire contract of insurance. *Royal Indemnity Co.* v. *Rexford,* 197 F. 2d 83 (CA 5 Fla. 1952). The opinion in that case quotes from the following: *Indemnity Insurance Co.* v. *Smith,* 197 Md. 160, 164, 78 A. 2d 461 (1951); *Cameron* v. *Berger,* 132 Pa. Super. 484, 1 A. 2d 529, 533 (1938); *Fischer* v. *Western & Southern Indemnity Co.,* 233 Mo. App. 885, 106 S. W. 2d 490, 494 (1937); *Eakle* v. *Hayes,* 185 Wash. 520, 55 P. 2d 1072, 1073 (1936); *Glen Falls Indemnity Co.* v. *Keliher,* 88 N. H. 253, 187 A. 473, 476 (1936). The following is from *Glen Falls Indemnity Co.* v. *Keliher*:

> "Every person familiar with the trial of cases by jury knows that the case of an individual defendant is seriously, if not hopelessly, prejudiced by his absence from the trial."

If there was any excuse for Serafine's failure to attend the personal injury trial as requested, the burden of explanation was on DeRosa. *Pawlik* v. *State Farm Mutual Automobile Insurance Co.,* 302 F. 2d 255, 257 (CA 7 Ill. 1962); *Maryland Casualty Co.* v. *Hallett,* 295 F. 2d 64, 72 (CA 5 Fla. 1961); *Muthart* v. *Burik,* 327 Ill. App. 170, 63 N. E. 2d 635, 640 (1945). DeRosa offered no evidence of

why Serafine absented himself from the personal injury trial, but still argues, Petition 7, that the Court of Appeals "has failed to give effect to the many explanations in the record for any apparent failure of the insured to cooperate". Below we shall show that the argued "explanations" are without merit, and that the Court of Appeals was right in holding that Serafine's failure to attend the trial was "without reasonable excuse".

I.

The first reason assigned for granting the writ of certiorari is: Serafine did not owe Aetna a duty to cooperate with it in the defense of DeRosa's claim against him because Aetna filed a declaratory action which raised the question of timely notice before it undertook the defense of the personal injury case.

Aetna had complained that the first notice given it of DeRosa's alleged injury or claim was nearly two years after the event. This issue was decided against Aetna by the District Court and by the Court of Appeals in *Century Indemnity Company* v. *Serafine,* 311 F. 2d 676 (CA 7 Ill. 1963). Thereafter, by the written stipulation of Serafine's personal attorneys, the lawyers furnished by Aetna entered their appearance and undertook the defense of the personal injury case (A. 224).

It does not seem reasonable that Serafine should, with the advice of personal attorneys, accept the benefit of their services and then assert that he had a right to refuse to attend the trial of the case because the request to do so came from these lawyers. Aetna was not guilty of any bad faith in its relationship with Serafine. A controversy, openly and fairly carried on between the insurer and its insured is not bad faith, especially where the insured is represented throughout by a personal attorney.

DeRosa's assertion here that Aetna's attorneys did nothing in preparation for trial of the personal injury case just is not so. No proof was made of such contention; no prejudice was shown. The record is that Serafine's personal attorneys were advising him throughout this litigation. It is undisputed that when the lawyers defending him telephoned Serafine, requesting his attendance at the coming trial, they were referred by Serafine to Martin Silverman, one of his personal attorneys. Silverman attended the trial and indeed testified for DeRosa. Can petitioner then say that some subjective reluctance of Serafine, even with the advice of a personal attorney, was legal justification for ignoring the request of Aetna that he attend and assist at the personal injury trial?

Illinois law on this subject is plain. A recent case, *Oda* v. *Highway Insurance Co.*, 44 Ill. App. 2d 235, 194 N. E. 2d 489 (1963), on the reciprocal duties of insurer and insured, observes, p. 245:

> "Where, however, a conflict of interest arises between the insurer and the insured, each owes a duty to respect the rights and interests of the other and to approach the common problem 'realistically with open hands and without concealed weapons.' *Traders & General Insurance Co.* v. *Rudco Oil & Gas Co.*, 129 F. 2d 621, 628 (Okla., 1942). Both the insured and the insurer had a responsibility. Neither could stand by and observe the course of the proceedings and then, after an unfavorable result, for the first time complain of the nature of the defense. . . ."

The attorneys furnished by Aetna were defending a personal injury case for Serafine with the consent of Serafine and his attorneys. They were entitled to Serafine's assistance and cooperation.

II.

It is argued that there was a conflict of interest between Aetna and Serafine; therefore the same attorneys should not have represented both. This charge is technical and not real. Of course, during the first declaratory suit the positions of Aetna and Serafine were antagonistic. In that case Serafine was represented by personal counsel. After the decision in this first declaratory suit ordering Aetna to defend Serafine, Aetna furnished attorneys who filed their appearance in a substitution signed by Serafine's personal attorneys. Thereafter, in the personal injury case in the state court, Aetna, having been ordered not only to defend the personal injury case, but to pay any judgment, had no interest inimical to Serafine. This was true until the very moment of the denial of the motion for a new trial.

Petitioner uses the epithet "bitterly antagonistic", but makes no reference to the record to support this language or to show that there was any conflict of interest on Aetna's part, to the prejudice of Serafine, in the defense of the personal injury case, by reason of inadequacy of coverage or any other matter.

Petitioner quotes from *Allstate Insurance Co.* v. *Keller*, 17 Ill. App. 2d 44, 149 N. E. 2d 482 (1958). Aetna has no quarrel with the decision and reasoning of the *Keller* case, but the facts have no resemblance to the instant case at all. In the *Keller* case the insurance company continued a confidential relationship with its insured, in order to make use of this relationship to build a defense for the insurer against the insured. Over a long period of time knowledge of the adverse position was withheld from the insured. Nor did he have the assistance of a personal attorney. In the instant case the insurance company promptly, two days after receiving the state court sum-

mons, its first notice of the claimed injury, notified Serafine's personal attorneys that because of late notice it was denying liability under its policy and would not defend him [Recited in opinion, *Century Indemnity Company* v. *Serafine,* 311 Fed. 2d 676, 678 (CA 7 Ill. 1963)].

Having quoted the court's very just denunciation of the wrongful conduct of the attorneys in the *Keller* case in taking over control of the defense meanwhile withholding from the insured the fact that the insurer was going to deny liability, petitioner hopes that this censure will in some way carry to attorneys furnished by Aetna. One thing is plain, Aetna and the attorneys furnished by Aetna never concealed from Serafine their decisions or their intentions. It is preposterous to charge Aetna with responsibility for Serafine's failure to attend the state court trial. The bad faith is Serafine's. His arrival in the courtroom at the state court trial with DeRosa's attorney and his own private attorney (A. 180) without any advance communication during the trial to the attorneys furnished to defend him is not the doing of Aetna.

At page 6 petitioner seeks to justify Serafine's failure to attend the personal injury trial when requested, by arguing "Serafine's reluctance to comply with any request of these attorneys". This is strange reasoning. The record shows that upon being requested to assist at the coming trial, Serafine told the caller to get in touch with Serafine's personal attorney (A. 170). Serafine's personal attorney was at the trial. It is preposterous to argue Serafine's "reluctance to comply with any request of these attorneys", when he had his personal attorney to act as intermediary. Can Serafine agree to the substitution of "these attorneys" and give them the duty to defend him if he is somehow unable to comply with their reasonable requests?

Yet this court is asked to review the decision of the

Court of Appeals because its opinion did not dwell at length on the subject, when it rejected the argument that this trivial speculation about Serafine's "reluctance", unsupported by evidence, might constitute a legal excuse for Serafine's unexplained breach of the condition of his contract. When the opinion uses the expression "without acceptable excuse" to characterize this contention, the Court makes clear that it has given due consideration to the excuse advanced. Need an opinion be as lengthy as the briefs?

CONCLUSION.

The reasons assigned by petitioner do not merit the granting of a writ of certiorari. Moreover, compelling grounds of public policy suggest that the Illinois law requiring a policy holder to attend the trial of an insured claim be not disturbed by this Court.

Respectfully submitted,

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